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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 810

FRANCIS A. SIMPSON, JR., JAMES T. SKEENS, JOHN C. RENNER, and FEDORA A. FLANAGAN, *Petitioners,*

v.

THE UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Francis A. Simpson, Jr., James T. Skeens, John C. Renner, and Fedora A. Flanagan, Petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled case on September 21, 1965.

CITATIONS TO OPINIONS BELOW

The United States Court of Appeals for the District of Columbia Circuit did not write any opinion in this cause.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on September 21, 1965, R. 51; p. 3a, infra. Rehearing was denied on November 9, 1965. R. 61. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

1. Did an affidavit, which was the sole predicate for a search warrant for a private residence and arrest warrants demonstrate probable cause where, other than observations of completely innocent activity, the affidavit only contained conclusionary information by confidential informants without any underlying circumstances being stated and also contained petitioners' criminal arrest and conviction records.

2. Is an affidavit, which is the sole basis for the issuance of a search and arrest warrants legally sufficient which contains a recital of the criminal arrest and conviction record of those for whom application for arrest warrants were made.

3. Did the Government prosecutor commit reversible error in suggesting to the jury in his closing argument that persons named on a Government exhibit seized in the execution of a search warrant were not brought in as witnesses because they would have refused to talk or taken the Fifth Amendment, where the record was devoid of any such evidence and was the error compounded by the Court's failure to instruct the jury to ignore the remarks.

Petitioners were charged in a six-count indictment with Federal and District of Columbia gambling violations: 18 U.S.C. 1952; 22 D.C. Code 1501, 1502, 1505; and with conspiracy to violate each of the above referred to statutes, 18 U.S.C. 371 (R. 12). Petitioners were found guilty, by a jury, of one (1) count, possession of number slips in violation of 22 D.C. Code Sec. 1502, a misdemeanor, and a mistrial as to the remaining counts was declared by the Court following a report by the jury that it was hopelessly deadlocked (R. ii). Retrial of the remaining counts of the indictment awaits the outcome of this petition for writ of certiorari.

Subsequent to indictment, petitioners moved to suppress the evidence seized in the raid, challenging the legal sufficiency of the affidavit which was the basis for the issuance of the search and arrest warrants and alleging that their rights under the Fourth Amendment to the Constitution of the United States had been violated (R. 13). The District Court denied the motion (R. 13). At trial, objections, on the same grounds, to the Government's proffer of evidence seized in the raid, were overruled, (Tr. 261, 322, 326, 340). Renewal of the motion to suppress, at trial and in post verdict motion was also denied (R. 16, Tr. 389, 554, 555). It cannot be doubted that all the evidence supporting defendants' convictions of possession of number slips consisted of the exhibits seized in the raid and testimony concerning the same.

The Search Warrant

Like Gaul, the six page affidavit, executed by ten special agents of the Federal Bureau of Investigation, may be divided into three parts. The major portion of the affidavit consists of observations of the four peti-

tioners by agents between August 7, 1962 and October 11, 1962, excluding the periods: August 10-19th; August 22- September 30th; and October 6-7th (R. 3-11). These observations consist of: seeing the petitioners, Skeens and Renner driving their automobiles in the State of Maryland; seeing the petitioner, Simpson, driving his automobile in the State of Virginia; observing Simpson, Skeens and Renner sitting at a table in the Hot Shoppe Restaurant around lunchtime; and viewing them entering and leaving premises 1452 Ogden Street, N. W., Washington, D. C. (R. 3-9).[3] All of this activity is remarkably similar to what thousands of people residing in suburban areas and working in Washington, D. C. do everyday. No improper activity of any description was observed.[4]

The second section of the affidavit comprises a recital of the petitioners' prior infractions of the law (R. 9-10). The third section is devoted to allegedly reliable information furnished by informants that defendants were engaged in the gambling business (R. 3), without however, any underlying circumstances as to credibility or reliability of either the information or the informants.

At Trial

During the execution of the search warrant, agents found a box containing slips of paper, one of which listed names and telephone numbers.[5] This was prof-

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[3] Defendants, Simpson, Renner and Skeens were also seen in the vicinity of 6214 Third Street, N. W., Washington, D. C. (R. 3-5).

[4] At trial these agents admitted that these observations indicated no misconduct of any description (Tr. Vol. I, 97-99; 105, 106, 114-118; Vol. II, 126, 127, 144, 145, 186, 187, 210, 211, 221, 228, 232).

[5] Government Exhibit No. 20C (R. 50).

fered as the typical paraphernalia of a gambling establishment. There was no further testimony concerning the persons whose names appeared on the exhibit or their connection, if any, with the petitioners. Government counsel, in his vituperative closing argument to the jury, in an effort to explain why he had not called these persons listed on the exhibit, as witnesses, informed the jury that if the Government had gone to these people, they would say, "I am not saying anything, or I am taking the Fifth Amendment . . ." (R. 32). Objection was immediately made, but overruled by the Court without correcting the error or attempting to minimize or eliminate the prejudice resulting therefrom (R. 32, 33).

Subsequent to the verdict, petitioners moved for a new trial, setting forth these issues (R. 16, 17). The motion was denied (R. 17, 18). Although the issues raised before the Court of Appeals were substantial and not frivolous, the Court did not write an opinion, but affirmed the convictions by entry of a judgment (R. 3a).

REASONS FOR GRANTING THE WRIT

1. This cause presents two important aspects, of affidavits used to obtain search and arrest warrants, which are critical in the administration of criminal justice in federal courts.

As pointed out hereinbefore, the affidavit in the instant case, which was the sole basis for a Commissioner's issuance of arrest warrants and the authorization of a search of a private home, was devoted almost entirely to observations of completely innocent activity, which the agents themselves conceded was not improper or even suspicious. But the other two phases of the

affidavit raise important questions. Part of the affidavit in the instant case was devoted to a recitation of the criminal record of petitioners (R. 3-11). This recitation was irrelevant and immaterial to the current investigation, except as an instrument of prejudice or unless the old adage of "once a criminal, always a criminal" has become a legal maxim. When may, and when may not, a criminal record be relevant to the issue of probable cause? This Court has said that it may be relevant, *Brinegar* v. *United States,* 338 U.S. 160, 172-174, and also has emphatically stated that, of itself, it may not furnish probable cause, *Beck* v. *Ohio,* 379 U.S. 89, 97. A more definitive explanation is necessary. If in a particular case, a criminal record is not relevant to the issue of probable cause, is its inclusion in an affidavit, improper, and prejudicial, as possibly effecting the determination of the Commissioner on the issue of probable cause? The instant case included not only remote convictions but also arrest records.

It is respectfully submitted that affidavits which are the sole predicate for search warrants should not include arrest records, nor records of convictions that are not closely related in point of time, and have some relevancy to the place being searched. Perhaps a far better practice, which would insure a fairer determination of the issue of probable cause by a Commissioner or Magistrate would exclude criminal arrest and conviction records.

The second phase of this affidavit deals with conclusions of confidential, hearsay informants. This Court has clearly delineated the law on this point in *United States* v. *Ventresca,* 380 U.S. 102 (1965), *Aguilar* v. *Texas,* 378 U.S. 108, (1964) and *Jones* v.

United States, 362 U.S. 257, (1960). It would seem however, that there is difficulty in the application of these decisions. The instant affidavit fails to set forth any underlying circumstances from which the affiants could have concluded that the informants were credible, or that the informants information was reliable, or any of the underlying circumstances which formed the basis for the informants' conclusions. A comparison of the affidavits in *Jones,* supra, and *Ventresca,* supra, with the instant affidavit, demonstrates, clearly, the lack of underlying circumstances. None of the usual circumstances, such as overheard incriminating conversation, carrying of brown bags, carrying of gambling paraphernalia, exchanges of money, bulging pockets, or even the placing of a bet, is present in the instant case.

In view of the fact, that most affidavits which are the basis for search warrants, contain information supplied by confidential informants, a study of the application of the underlying circumstances rules to a situation such as the instant case, is warranted.

2. "Too many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury by claiming the privilege.

* * *

"On the other hand the danger that the jury made impermissible use of the testimony by implicitly equating the plea of the Fifth Amendment with guilt is, in light of contemporary history, far from negligible. *Grunewald* v. *United States,* 353 U.S. 391, at 421, and 424 (1957).

In the light of these comments by this Court, it is strange that the Court of Appeals has permitted a

prosecutor to suggest to a jury in his closing argument, over objection, that had he called certain persons as witnesses, they would have taken the Fifth Amendment.[6] Certainly, of all people, a Government prosecutor, "... should be better advised ..." than to view this privilege as a shelter for wrongdoers. As was stated by this Court in *Grunewald,* supra, the danger was obvious that the jury in the instant case would believe that the persons whose names on the list (Government Exhibit 20 C)[7] had or would take the Fifth Amendment plea of self-incrimination in answer to any relevant questions posed by Government counsel, and that therefore they must have been involved in a gambling violation. Since they were so involved, the petitioners possession of a list of their names was incriminating. Such a practice, by a Government prosecutor, should be condemned.

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[6] The Government prosecutor in reply to the defense argument that the Federal Bureau of Investigation for all of its investigating in the case, did not bring before the jury those persons listed on Government Exhibit 20C, which the Government contends is the type of document kept by gamblers, said:

> Why weren't they here on the stand? Well, they gave their own answer. That wasn't found, that list wasn't found until the day that the FBI agents made the arrest. If you went to those people now—there aren't enough wire taps around to prove what went on between those phones—if they say: I am not saying anything, or I am taking the Fifth Amendment, what can you do? (R. 32).

[7] R. 50.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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